APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed June 14, 1973, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING, INC., *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Defendants.

ORDER

This matter comes before the court on the separate motions to dismiss or, in the alternative, for summary judgment, submitted by each of the two defendants, the Washington Metropolitan Area Transit Authority (WMATA) and S.A. Healy & Co. The court has considered the memoranda and supplemental memoranda submitted in support of the defendant's motions and has considered the plaintiffs' memoranda, including their consolidated statement, submitted in opposition thereto.

The plaintiffs are the owners of the Anchorage Office Building which is located on the southeast corner of the Connecticut Avenue and "Que" Street, N. W. intersection in the District of Columbia. This action arises out of the planning and construction of a vent shaft which is needed for the Metro subway station to be located at Dupont Circle. The vent shaft has been located in front of plaintiffs' building and plaintiffs claim damages as a result of its location and construction.

In their complaint, the plaintiffs allege that for nine months barricades set up by the defendants in order to accomplish the construction completely cut off direct access between the building and Connecticut Avenue and between the building and Que Street, and that as a result thereof, access to and from Que Street was limited to a dark, wooden walkway which led only to 19th Street, approximately one-half block to the east. It is further alleged that display windows of the street level retail shops located in the building were completely blocked off by the barricades, that deliveries to the building were made unduly difficult, and that other conditions, which generally caused serious and unreasonable interference with the normal operation of the building, remained for approximately 1½ years. The plaintiffs also allege that the defendant WMATA failed to adequately consider alternative sites for the vent shaft and that at least one of these sites, a triangular plot of land belonging to the National Park Service, could have been used. In addition, plaintiffs allege that the noise, explosions, dust and smoke from the construction constituted a public and private nuisance which, in turn, was aggravated by the poorly chosen location of the vent shaft. Finally, plaintiffs allege that there was an unnecessary and unreasonable delay in the completion of construction.

Defendant S.A. Healy & Co. argues in its motion that it has been operating totally within the authority of its contract and its actions were reasonable in view of the nature of the job. Because of the unanticipated rock conditions it discovered when work commenced, it argues that the work was not unnecessarily delayed.

Defendant WMATA also argues that the delay was reasonable in view of the unforeseen site conditions. It further claims that a decision on the location of the vent shaft was made only after a careful planning and review of all the alternative sites including an examination into

the feasibility of using the triangular piece of parkland already referred to. WMATA also raises the affirmative defense of sovereign immunity arguing that the decision as to the location of the Que Street vent shaft is a governmental function involving a policy determination thereby making WMATA immune from suits challenging this decision.

First, the court is not persuaded that the doctrine of sovereign immunity can be applied to WMATA's decision to locate the vent shaft in front of the plaintiffs' building. Section 80 of the interstate compact which provided for the establishment of the WMATA, P.L. 89-774, 80 Stat. 1324, 1350 obviously intended to abrogate, at least partially, WMATA's immunity from tort liability. Merely because a governmental agency carries on an activity—in this case the construction of a vent shaft—this activity does not become immune from suit. *Spencer* v. *General Hospital of the District of Columbia*, —— U.S. App. D.C. ——, 425 F.2d 479 (1969); *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (D.D.C. 1955); *District of Columbia* v. *Totten*, 55 U.S. App. D.C. 312, 5 F.2d 374, *cert. denied* 269 U.S. 562 (1925); *Restatement on Torts, 2d* § 895 (Tent. Draft No. 19, 1973).

Second, plaintiffs have alleged sufficient facts to support a cause of action for interference with their rights of easement for access, light, and air, complaint ¶¶ 10-15, and for public and private nuisance, complaint ¶¶ 16-20. See *Prosser*, Handbook on Law of Torts § 88 (3d ed. 1971); *R. Powell, The Law of Real Property* ¶¶ 410, 413, 420; *Restatement of Property* § 450; *District of Columbia* v. *Totten, supra; Marzo* v. *Seven Corners Realty, Inc.*, 171 F.2d 144 (D.C.C. 1948).

Finally, with respect to defendants' motion for summary judgment, plaintiffs raise several material issues of fact which remain in dispute. Summary judgment is a

judgment in bar that results from application of substantive law to facts that are established beyond reasonable controversy. 6 *J. Moore, Federal Practice* ¶ 56.11 [1.0] at 2143. The burden is on the movant and any reasonable doubt as to the existence of a genuine issue of fact should be resolved against the movant. *Dewey* v. *Clark*, 180 F.2d 766 (D.C.C. 1950); 6 *J. Moore, supra* ¶ 56.02[1]. Since the record indicates that material facts necessary to resolve the questions raised in this case are still in dispute, summary judgment should be denied.

It is, therefore, this 14th day of June, 1973,

ORDERED, that defendant WMATA's motion to dismiss or, in the alternative for summary judgment, be, and it hereby is, denied; and it is further

ORDERED, that defendant S.A. Healy & Co.'s motion to dismiss or, in the alternative for summary judgment, be, and it hereby is, denied.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Sep. 20, 1973, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et. al.*,
Defendants.

ORDER SEPARATING TRIAL ON ISSUE OF DAMAGES FROM TRIAL ON THE ISSUE OF LIABILITY

It appearing that separate trials on the issue of liability and on the issue of damages will be conducive to expedition and economy in this case; F. R. Civ. P. 42(b), it is this 19th day of September, 1973,

ORDERED, that the issue of liability be bifurcated from the issue of damages and be separately tried in advance of the trial on the issue of damages.

/s/ Thomas A. Flannery
United States District Judge

A-6

UNITED STATES MAGISTRATE
UNITED STATES DISTRICT COURT
Washington, D. C. 20001

Room #1205

ARTHUR L. BURNETT
U. S. Magistrate

February 27, 1974

Mr. Clifford J. Hynning
1555 Connecticut Avenue, N.W.
Suite 301
Washington, D. C. 20036

Dear Mr. Hynning:

In connection with your telephone conversation with me on February 27, 1974 concerning the pretrial conference scheduled Wednesday, March 13, 1974 at 10:30 A.M. in Anchorage Office Building Company, et al v. Washington Metropolitan Area Transit Authority, Civil Action Number #171-72 and your representation that Judge Flannery had granted a bifurcated trial on the issues of liability and damages, trial as to liability only to be held first, special damages need not be included in the pretrial statements required: a subsequent pretrial on the issue of damages can be held later if the plaintiff is successful on the issue of liability.

As to liability, the pretrial statement must set forth particular facts in detail as to grounds for liability. If the grounds for liability are novel or controversial legal precedent should be cited.

With reference to stipulations and an agreed statement of facts, the pretrial statements should set forth all such matters as to which there is no dispute. Counsel are

instructed also to have a prepared list of purposed exhibits to be offered at trial, the list identifying the exhibits and furnishing a brief description sufficient to identify the exhibit at trial.

The instructions herein superseded the instructions initially sent scheduling the pretrial and apply to all parties.

Sincerely,

/s/ Arthur L. Burnett
ARTHUR L. BURNETT
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Oct. 2, 1974, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

and

S. A. HEALY & COMPANY,
Defendants and Third-Party Plaintiff,

v.

SPENCER, WHITE & PRENTIS, INC.,
Third-Party Defendant.

MEMORANDUM

This action was brought by the plaintiffs to recover damages from the Washington Metropolitan Area Transit Authority under several different theories of liability for interference with easement, public and private nuisance, and absolute liability under the District of Columbia Building Code. The case came on for trial on September 16 and 17, 1974. Plaintiffs put on their case in chief and formally rested.[1] Defendant, Washington Metropolitan Area Transit Authority (WMATA), has moved to dismiss the action pursuant to Rule 41(b) of the

[1] Prior to completion of their case, plaintiffs dismissed with prejudice their claim against deefndant S. A. Healy & Company. S. A. Healy & Company thereafter dismissed its third-party complaint against Spencer, White & Prentis, Inc.

Federal Rules of Civil Procedure, asserting that upon the facts and the law the plaintiffs have shown no right to relief. This Opinion constitutes the court's findings of fact and conclusions of law with respect to defendant's motion to dismiss.

The complaint in this matter, as summarized by the court in its Order entered herein on June 14, 1973, and apparently adopted by the plaintiffs as an accurate statement of their factual allegations, asserts the following:

1. For nine months, barricades set up by the defendant completely cut off direct access between the Anchorage Office Building and Connecticut Avenue, and between that building and Que Street; and that as a result thereof access to and from Que Street was limited to a dark wooden walkway which led only to 19th Street;

2. Display windows of the street level retail shops were completely blocked by barricades; that deliveries to the building were made unduly difficult and that other conditions existed that caused serious and unreasonable interference with normal operation of the building;

3. That WMATA failed to adequately consider alternate sites for the vent shafts;

4. That noise, explosion, dust and smoke caused a public and private nuisance which was aggravated by choice of location; and

5. That there was unnecessary and unreasonable delay.

The court, in its Order of June 14, 1973 stated that these allegations, if supported by evidence at trial, constituted a cause of action for interference with easement and public and private nuisance.

The court also has considered whether the evidence adduced at trial is adequate to sustain absolute liability under the District of Columbia Building Code, Article

22, Section 3-786, although that cause of action was not included in plaintiffs' pretrial statement and is not properly before the court.[2]

After listening to the evidence presented, carefully reviewing the entire transcript of the case and all of the exhibits which were introduced, and after drawing all legitimate and reasonable inferences in a light most favorable to the plaintiffs, the court is prepared to state that the evidence tended only to establish the following:

1. Plaintiffs are the owners of the Anchorage Office Building located on the southeast corner of Connecticut and Que Streets, N. W., in the city of Washington, D. C.;

2. From mid-1970 until late 1972 or early 1973, WMATA or their independent contractor engaged in the construction of a segment of the transit system including a vent shaft located in public space on the southeast corner of Que Street, N. W., in the sidewalk next to the Anchorage Office Building;

3. From August, 1970 through October, 1970, WMATA or their independent contractor engaged in underpinning the Anchorage Office Building. The underpinning was delayed from mid-March, 1970 until August, 1970 in order that plaintiffs' permission could be obtained.

4. By letter from plaintiff Hynning to General Jackson Graham, General Manager of WMATA, dated July 7, 1970, as amended July 17, 1970, plaintiffs consented to the underpinning. That letter, plaintiffs' Exhibit No. 5, states in pertinent part:

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[2] Defendant vigorously has argued that this court cannot consider plaintiffs' claim under Article 22. The defendant is correct in pointing out that this theory for relief appears nowhere in plaintiffs' pretrial statement or in the Magistrate's summary of plaintiffs' theories for recovery. The court has included a discussion of this theory only because plaintiffs, even though permitted to proceed on this theory, have failed completely to support its application by introduction of evidence.

> Accordingly, I am prepared to consent to the underpinning of my property in accordance with the provisions of your letter of July 6, 1970, provided that at all times, except as noted below, your contractors will provide a covered walkway, four feet width and eight feet height, runing along Que Street from Connecticut Avenue to 19th Street. I recognize that during the limited time period which your staff has estimated at approximately 105 days, construction activities will be of such a nature that it will be impossible to safely maintain such a walkway. . . . During this time of necessity, which is limited to 105 days in duration, I will waive the above requirements of an entranceway from Connecticut Avenue.

5. During the underpinning activity, a period of approximately 90 days, there was no direct access to the Anchorage Office Building from Connecticut Avenue along Que Street; it was necessary during this phase of construction to enter the Que Street entrance from 19th Street;

6. In November, 1970, defendant WMATA or their independent contractor constructed a covered pedestrian walkway pursuant to plaintiffs' request and to afford protection to the public. Thereafter, except for brief periods in 1972, there was direct access to the Anchorage Office Building from Connecticut Avenue;

7. The construction activities never completely barred access to the Anchorage Office Building, but did make access less convenient;

8. Some persons declined to use the covered walkway;

9. During the construction period, some retail shops in the building were behind barricades. Some tenants complained of noise, explosions and interference. Tenants were more difficult to find because of the construction;

10. During the construction period, there were loud explosions which jarred the Anchorage Office Building. These explosions did not break any windows, but did dislodge putty from glass windows, cause paint to chip and allegedly broke fixtures on certain French-type doors;

11. In 1973 it was discovered that a window of one store had settled below a level which existed at some unspecified prior time;

12. Barricades were attached to the Anchorage Office Building with steel pins;

13. Construction of the vent shaft was scheduled to be completed in July, 1971 but was not completed until late 1972 or early, 1973. All barricades and the walkway were removed in late 1972 and sidewalks were replaced in early 1973; and

14. Although plaintiffs alleged that there were two alternative locations for the vent shaft other than the site adjacent to the Anchorage Office Building, plaintiffs were unable to show that either site was an available alternative. Rather, the evidence tended to show that the National Park Service would not permit the use of parkland at the northwest corner of Connecticut Avenue and Que Streets; and that the rock conditions and the proximity of the escalator shaft prohibited use of the southwest corner of Connecticut and Que Streets.

Apparently, plaintiffs have argued that the prolonged interference with their rights of easement to access over sidewalks and streets, to light and to air constitutes a taking without compensation. These allegations are set forth on page 7 of plaintiffs' pretrial statement. The plaintiffs have failed to introduce evidence of the type of serious deprivation which is required in order to constitute a taking under the Fifth Amendment. Plaintiffs have failed to show that any deprivation which they sustained was of such a permanent or complete nature

as to require granting compensation to them. In addition, the evidence, as presented in plaintiffs' Exhibit 5, indicates that the plaintiffs consented to much of this interference. Finally, plaintiffs have failed to show that the construction was unduly or unreasonably prolonged, such as to continue interference with business for an unnecessary length of time. *See Meyers* v. *District of Columbia*, 17 F.R.D. 216, 217 (D.D.C. 1955).

The general rule regarding temporary obstruction of property has been stated in 2A J. Sackman, *Nichols' The Law of Eminent Domain* § 6.444[2] (1974):

> When a street is so obstructed during the construction of a public work that access to abutting property is wholly cut off, the fact that the injury is only temporary is generally held to be no reason for denying the owner compensation. However, when access, though rendered difficult and inconvenient, is not wholly cut off, the owner is denied compensation. This is so even if there is such an injury to the use of the property for business purposes during the construction of the work as to materially affect the value of the leasehold interests, and this injury is due to the presence of structures in the street that would undoubtedly constitute a ground for compensation if they were maintained there permanently. This rule is hard to defend on principle. But the impossibility of constructing a subway or a sewer or of laying a water-pipe in the streets of the business section of a city without in some degree interfering with access to abutting property, and the consequent danger of a multiplicity of suits from the determination of which it might be impossible as a practical matter to exclude mere damage to business, have led the courts to reject claims of this character as a matter of public necessity.
>
> However, if as a result of negligence, the time for the completion of the project is unduly and unreasonably prolonged, thereby continuing interfer-

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> ence with business for an unnecessary length of time, a cause of action for damages arises against the government. The inconvenience and damage which a property owner suffers from temporary obstructions are incident to city life and must be endured. The law gives him no relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made. However, if the temporary obstruction is a result of unreasonable, unnecessary, arbitrary or capricious acts or conduct by the one in charge of the improvement or construction, the abutting landowner has a right of action for damages resulting from such interference with access to his property. (citations omitted).

This court had occasion to consider the allegation of a taking with regard to the construction of the Dupont Circle underpass in *Meyers* v. *District of Columbia*, 17 F.R.D. 216 (1955). In *Meyers* Judge Holtzoff stated:

> Obviously, improvements of this nature are necessary from time to time and Governmental authorities would be derelict in their duties if they did not recognize the need for them when it arises and act upon it. Consequential damages to adjoining property owners in the way of diminution of business while construction is in progress, does not constitute a taking of property for which compensation must be made under the Fifth Amendment . . . Such losses must be borne by the individual as part of the price that he pays for being a member of organized society and living in an urban community. 17 F.R.D. at 217.

The court concludes that the evidence of interference in this case, as in *Meyers*, is not such as to constitute a taking for which compensation must be made. *See also*, *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 58 L.Ed. 1088 (1914); *Baltimore & Potomac RR Co.* v.

Fifth Baptist Church, 108 U.S. 317, 27 L.Ed. 739 (1883).

The plaintiffs advance a further theory of relief by alleging that defendant's actions have created a public and a private nuisance. Plaintiffs acknowledge that this theory is really part of their larger theory that the interference with access constituted a taking without compensation.[3]

The factual allegations made by plaintiffs in reference to the existence of a public and a private nuisance are that the ingress and egress to plaintiffs' building were interfered with and that blasting and other construction activities loosened the putty, paint, and window fixtures in their building. The plaintiffs, however, have not succeeded in establishing that the interference with ingress and egress was a substantial or unreasonable interference with their property. Since the plaintiffs consented to 105 days with no access to their building from Connecticut Avenue, they cannot be heard to complain that 90 days with no access was unreasonable. Plaintiffs have not shown that defendants' selection of the site where construction was to occur was unreasonable because of the presence of feasible alternate sites which would not cause damage. *See Baltimore & Potomac R.R. Co.* v. *Fifth Baptist Church, supra.* Even though the plaintiffs have shown that the construction period was extended, they have failed to prove that this delay was unreasonable or unnecessary. As in *Meyers* v. *District of Columbia, supra,* no interference with ingress and egress due to unreasonable

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[3] Since the Metro construction was authorized by act of Congress, it appears *doubtful* that the construction could constitute a public nuisance. *See Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 552 (1914). *See generally* W. Prosser, *Law of Torts* 606-07 (4th ed. 1971). Of course, just because the construction was authorized by Congress and cannot constitute a nuisance does not mean that private recovery cannot be obtained. *See Richards* v. *Washington Terminal Co., supra.*

and unnecessary delays in construction existed to form the basis of an award of damages. Thus, the plaintiffs have failed to establish a *prima facie* case.

As to the putty, paint, and window damage, the plaintiffs have failed to present any evidence that they suffered any damage different from that sustained by the general public. Prosser, in his work on torts indicates that: "There is general agreement on the requirement that the plaintiffs' damage be different in kind, rather than in degree from that shared by the general public." W. Prosser, *Law of Torts*, 587 (4th ed. 1971). A large part of Connecticut Avenue was subject to Metro construction during this period, a fact of which the court takes judicial notice. The plaintiffs have shown no evidence to indicate that other buildings were not also jarred by the blasting. In addition, on the evidence presented, the jarring suffered by the plaintiff cannot be considered as substantial interference. Rather, the jarring is like those inconveniences referred to by the court in the *Meyers* case as the price which people must pay for public improvements. The jarring to the plaintiffs' building can also be compared with the vibrations caused by the movement of the trains in the track which resulted in cracking of walls and wallpaper, the breaking of windows, and the disturbance to the peace of the occupants of the house which the Court in *Richards*, *supra*, indicated were incidental damages not necessitating the granting of compensation. Finally, it must be noted that the plaintiffs withdrew their allegations of damage to their building caused by the defendant's negligent construction activities. (Tr. at 321-22).

The plaintiffs further have alleged that the defendant engaged in ultrahazardous activity by its blasting work. Even in ultrahazardous activity, inquiry into the reasonableness of the defendant's conduct is required. Hence, Prosser states that: "The abnormal character of the en-

terprise itself will depend upon the place and the manner in which it is carried on, the harm which is inflicted or threatened, and the general utility of the defendant's conduct . . ." Prosser, *Law of Torts*, 583, *supra*. In this case, the plaintiffs have done no more than to argue that the defendant engaged in ultrahazardous activity. No evidence was introduced as to the dangers involved or the harm threatened. Plaintiffs have not even established the precise location of the blasting or that the blasting was done by WMATA contractors. Plaintiffs plainly have failed to show that the defendant's activity was unreasonable or ultrahazardous under the facts in this case.

Plaintiffs' final theory of recovery is based on absolute liability arising under Article 22 of the D. C. Building Code.[4] The plaintiffs have asserted that their building settled due to the underpinning and that absolute liability attaches to the defendant's activity when doing this work. Plaintiffs, however, have failed to introduce any evidence that the defendant caused the alleged damage and have thus failed to sustain their burden of proving causation. Without presenting evidence of causation, the plaintiffs have failed to make out a *prima facie* case on this theory.

For the foregoing reasons, the court finds that the plaintiffs have failed to carry their burden to establish a *prima facie* case on any of their theories of recovery. Therefore, the court will grant the defendant's motion to dismiss under the provisions of Rule 41(b) of the Fed-

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[4] In pertinent part the underpinning provision provides:

> Whenever excavation is carried to a depth which is below the adjoining premises, the person who causes such excavation to be made shall, if given the written permission to enter the adjoining premises, at all times and at his own expense, preserve and protect from injury any structure the safety of which may be affected by such part of the excavation, and such person shall provide support for the adjoining structure by proper foundations.

eral Rules of Civil Procedure. An appropriate judgment accompanies this Memoradum.

/s/ Thomas A. Flannery
United States District Judge

Date: October 2, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 171-72

[Filed Oct. 2, 1974, James F. Davey, Clerk]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Plaintiffs,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
and S. A. HEALY & COMPANY,
Defendants and Third-Party Plaintiff,

v.

SPENCER, WHITE & PRENTIS, INC.,
Third-Party Defendant.

JUDGMENT

This matter came for trial before the court without jury on September 16, 1974. At the conclusion of plaintiffs' case, defendant moved to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. It appearing that upon the facts and the law that plaintiffs have shown no right to relief, it is this 2nd day of October, 1974,

ORDERED that defendant's motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED and ADJUDGED that judgment be entered for defendant with costs assessed to plaintiffs.

/s/ Thomas A. Flannery
United States District Judge

NOT TO BE PUBLISHED—SEE LOCAL RULE 8(b).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1975

No. 75-1001
Civil Action No. 171-72

[Filed Dec. 3, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

[No Opinion]

ANCHORAGE OFFICE BUILDING COMPANY, *et al.*,
Appellants

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, McGOWAN, and WILKEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by court. *See* Local Rule 13(c).

This court is unable to say that the District Court's findings of fact are clearly erroneous. *See* Rule 52(a),

FED. R. CIV. P. Nor are we able to find legal error requiring reversal of its judgment. *See* 28 U.S.C. § 2111 (1970); Rule 61, FED. R. CIV. P.

On consideration of the foregoing, it is ORDERED AND ADJUDGED by this court that the judgment of the District Court appealed from in this case is hereby affirmed.

PER CURIAM

FOR THE COURT

/s/ Hugh E. Kline
HUGH E. KLINE
Clerk